statement of claim was prepared by me when I was officiating as State Legal Adviser, Selangor). I come to the conclusion that the file in question is not by its nature privileged under section 126(1) of the Evidence Ordinance, and I also find it is most relevant to the defence. The defendants were employed by the plaintiff to do certain works known as Sungai Kelambu Drainage Scheme after the former had successfully tendered for the works for the sum of $172,224.40. As a result of their failure to complete the works in accordance with the agreement entered into between the parties, the plaintiff invited a second tender for completion of the works left over by the defendants. This time, Messrs. Soon Tat & Company were successful in their tender for the sum of $241,906.40. In the result, in accordance with a clause in the first contract, the plaintiff claims a sum of $113,983.15 alleged to be due from the defendants.

By paragraph 7 of the statement of defence, the defendants contend that the plaintiff did not take reasonable and diligent steps in calling for the second tender and in completing the remaining works and that the contract sum of $241,906.40 alleged to be awarded to Messrs. Soon Tat & Company is exhorbitant and excessive. Having regard to the nature of the defence, I think it is only fair and just that the defendants should be given the opportunity to inspect the file in respect of the second tender for the purpose of establishing whether or not the contract sum of $241,906.40 awarded to Messrs. Soon Tat & Company is exhorbitant and excessive.

On the question of privilege, I do not think that the file in question by its very nature comes within the ambit of the provision of section 126(1) of the Evidence Ordinance. The affidavit dated April 22, 1971 does not state precisely in what way the plaintiff intends to put the claim for protection. In this case, the file relating to the tender documents of all the other contractors who together with Messrs. Soon Tat & Company tendered for the second contract is not, in my view, confidential communication between solicitor and client. There is no evidence to support that it contains documents which the plaintiff has submitted to its solicitor confidentially or with which the solicitor has become acquainted in the course and for the purpose of his professional employment. The plaintiff's claim is basically based on the breach of the first contract and not of the second contract.

Further, in the case of *Chadlick* v. *Bowman*,[1] it was held that documentary information from third persons not called into existence by the solicitor, though obtained by him for purposes of litigation are not privileged. Similarly, in this case, the documents concern tenders by third parties (the contractors) with the State Drainage and Irrigation Engineer. The fact that he is an agent of the State Government is irrelevant, as the inspection of the documents will not be against public policy. On the other hand, it will show whether or not the tenders board has acted reasonably in accepting the tender of Messrs. Soon Tat & Company. As stated by Jessel M.R. in *Wheeler* v. *Le Marchant*:[2]

"In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged.... Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently."

In my view, from the circumstances of this case and from the nature of the documents, the claim for privilege cannot be sustained.

The application is, therefore, allowed in terms of the summons.

Application allowed.

Solicitors: *Chooi & Co.*

ANNA YONG YU HIONG v. GOVERNMENT OF SARAWAK

[O.C.J. (B.T.H. Lee J.) June 11, 1971]

[Kuching — Civil Suit No. K. 42 of 1970]

Damages — Assessment — Measure of — Gratuity and pension under the Widows' and Orphans' Pensions Ordinance (Sarawak Cap. 90) — Whether to be taken into account — Considerations on calculation of amount of dependency.

The plaintiff, widow and administratrix of the estate of her deceased husband, claimed damages in respect of his death from injuries received while a passenger in the defendant's vehicle, sometime on May 20, 1969.

The defendant admitted liability and the only question to be determined was the amount of damages recoverable by the plaintiff.

The deceased was an overseer artisan grade I, employed by the Public Works Department, Miri, Sarawak. He was about 29 years old at the time of the accident. He left behind a widow and two children, then aged 16 months and 6 months respectively, all of whom were dependent on the deceased. It was not in dispute that the deceased's basic salary at the time of his death was $230 per month. In addition he was entitled to $17 children's allowance. His overtime allowance averaged $100 *per mensem*.

The plaintiff had been granted pension in the sum of $110.27 per month under the Widows' and Orphans' Pensions Ordinance since the death of her husband. She also received death gratuity under the Pensions Ordinance in the sum of $2,760.

The question which arose for decision was whether account should be taken of the pension which was received by the widow.

Held: (1) the Widows' and Orphans' Pensions Ordinance (Sarawak Cap. 90) has no counterpart equivalent to section 40 of the English Widows' Orphans' and Old Age Contributory Pensions Act, 1956, which excludes widows' and orphans' pensions in assessment of damages. Therefore, in applying the common law, such pensions and death gratuity must be taken into account;

(2) the law in West Malaysia is different from the law in Sarawak. Section 7 of the Civil Law Ordinance, 1956, as amended, provides further that in assessing damages by way of compensation to the family of a person for loss occasioned by his death, there shall also not be taken into account any pension or gratuity paid as a result of the death;

(3) in the circumstances of this case, an award of $22,758.72 was a fair and proper sum, to be apportioned accordingly between the widow and her two children;

(4) the award in respect of the children was to be deposited in an approved savings bank on trust for the minors.

[**Editorial Note:** By virtue of P.U.(A) 424 of 1971, the Civil Law Ordinance (Extension) Order, 1971, shall come into force on April 1, 1972. By this Order, the Civil Law Ordinance, 1956, of Malaya, as so modified, will be extended to the States of Sabah and Sarawak. One consequence, *inter alia*, is that it will repeal the whole of the Application of Laws Ordinance (Sarawak Cap. 2). This would mean that after April 1, 1972, the civil law in Sarawak will be the same as in West Malaysia, in particular that any compensation payable to the family of a deceased person, shall not take into account any pension or gratuity paid as a result of the death.]

Cases referred to:-

(1) *Lory* v. *Great Western Railway Co.* [1942] 1 All E.R. 230.

(2) *Raja Mokhtar bin Raya Yaacob* v. *Public Trustee, Malaysia* [1970] 2 M.L.J. 151.

(3) *Lee Sai Cheong* v. *Wan Lim Cheong* [1962] M.L.J. 259.

(4) *Chang Kok Sing & Anor.* v. *Koo Lan* [1966] 1 M.L.J. 170.

(5) *Johnson* v. *Baker* (1825) 2 C. & P. 207; 172 E.R. 94.

(6) *Goldstein* v. *Salvation Army Assurance Society* [1917] 2 K.B. 291.

(7) *Mallett* v. *McMonagle* [1969] 2 All E.R. 178.

(8) *Davies & Anor.* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 at p. 617.

(9) *Seenivasan & Anor.* v. *Lim Yew Seng* [1961] M.L.J. 22 at p. 23.

(10) *Lim Ah Chi* v. *Tah Ah Mui & Anor.* [1969] 1 M.L.J. 215.

CIVIL SUIT.

T. O. Thomas for the plaintiff.

G. Grimmett (Crown Counsel) for the respondent.

B.T.H. Lee J.: The plaintiff in this case is the widow and administratrix of the estate of Chin Hon San, deceased, and she claims damages for the death of her husband from injuries received while he was a passenger in the defendant's Land Rover sometime on the 20th May, owing to the negligence on the part of the defendant's servants or agents.

The defendant admits liability and the only question debated was the amount of damages recoverable by the plaintiff.

The facts material to this issue, so far as the claim is concerned, are these.

The deceased was an overseer artisan grade I employed with the Public Works Department, Miri, Sarawak. He was about 29 years when this tragic accident made her a widow, and her two children were then aged 16 months and 6 months respectively.

There is no doubt that the plaintiff and her two children were dependent on the deceased. They were all in good health as had been the deceased.

It is not in dispute that the deceased's basic salary at the time of his death was $230 per month. In addition he was entitled to $17 children's allowance. Employee's Provident Fund deduction was $11.50. His overtime allowance averaged $100 *per mensem*.

The deceased has an account in the Chartered Bank, Miri. The sum was about $6,676.46 which the plaintiff has received.

The plaintiff had been granted pension in the sum of $110.27 per month under the Widows' and Orphans' Pensions Ordinance since the death of her husband. She also received death gratuity under the Pensions Ordinance in the sum of $2,760 (Exhibit D9).

She claimed $2,150 for funeral expenses which sum included mourning. The coffin costs $500 in Miri. The dead body was brought from Miri to Kuching. She did not keep any account.

She had no intention of re-marrying. Her mother became a widow at an early age and remained a widow.

The substance of the evidence of the divisional engineer, Public Works Department, Third Division, Sibu (PW2) was to the effect that the deceased worked under him. He started as a daily paid worker and was later absorbed into the establishment on 1st July, 1967. He was on probation at time of his death. Probation period is 36 months.

The deceased's basic salary was $230 per month with yearly increments of $10. It would take about 8 years to reach the maximum of $350.

He added that the minimum time likely to elapse before deceased was eligible for promotion to mechanical superintendent is 14-15 years. This would depend on vacancies and continued good reports.

He said deceased was an efficient worker with good promotion prospects. He was reported to be an able and efficient officer who was both hardworking and responsible.

Four calculations prepared by Ong Choo Siew (PW5), chartered accountant and certified public accountant of Messrs. Turquand Young & Co., were submitted on behalf of plaintiff for the court's consideration: —

(a) $99,620 on the assumption that the deceased would not be promoted from his position of overseer/artisan grade I at date of death to the retirement age of 55 — (Exhibit P11);

(b) $134,930 on the assumption that the deceased would be promoted from his position of overseer/artisan grade I at date of death to foreman/chargeman grade II and ultimately to foreman/chargeman grade I — (Exhibit P12);

(c) $142,160 on the assumption that the deceased would be promoted from his position of overseer/artisan grade I at date of death to foreman/chargeman grade II and to foreman/chargeman grade I and ultimately to works superintendent — (Exhibit P13) and finally;

(d) $162,500 on the assumption that the deceased would be promoted from his position of overseer/artisan grade I at date of death to foreman/chargeman grade II and to foreman/chargeman grade I and to works superintendent at the age of 46 years in 1985 — (Exhibit P14).

PW5 said the figure did not take into consideration child allowance, overtime nor increases recommended in the *Suffian* Report.

This witness admitted in cross-examination that he made no allowance that capital had been paid in advance, or interest on capital. Nor did he make any allowance for prior death of deceased before 55 years, nor for the possibility of death of wife before that time.

Neither has he made allowance for the fact that in 16 years time the children will be earning. He has also not taken into account the possibility that the plaintiff might re-marry since she is still comparatively young despite the fact she has said she had no intention of doing so and having two young children on her hands.

He also admitted that he is not familiar with the way the court calculated Fatal Accidents Acts damages.

He agrees $99,620 invested at 5% interest would exceed $400 per month.

And $134,930 invested at the same rate would yield about $560 per month.

$142,160 invested at 5% would yield about $600 per month and lastly $162,500 (the sum originally claimed by plaintiff) would yield $670 per month.

It is to be observed that the above yields are substantially in excess of the basic salary of the deceased at time of death.

Counsel for the plaintiff submitted that the calculation should proceed as follows:

$162,500.00 (Exhibit P.14)		
$162,500.00 ÷ 25 years	=	$ 6,500.00 *per annum*
Average overtime $100 in 1 year	=	$ 1,200.00
Total income plus overtime per year	=	$ 7,700.00
Assuming 1/3 spent on deceased — Balance	=	$ 5,133.34
Say 4% interest	=	15.6221
Total would be	=	$80,080.10
Deducting $2,000.00 (bank account) Balance	=	$78,080.10
Add funeral expenses ($2,100.00) Total	=	$80,180.00

If court is against the plaintiff in regard to pension:

Total income plus overtime	=	$ 7,700.00 per year
Assuming 1/3 spent on deceased	=	$ 4,251.17
4% interest of $1,323.24	=	15.6
Total	=	$66,318.25
Deducting $2,000.00 bank account	=	$64,318.25
Add funeral expenses	=	$ 2,150.00
Total	=	$66,468.25
If pensions excluded — just over		$80,000.00
If taken into account —		$66,468.00

It is to be observed that $80,180.10 invested at 5% would yield about $335 per month.

By virtue of section 2 of the Application of Laws Ordinance of Sarawak (Cap. 2) the law of England as on 12th December, 1949, seems to me to be applicable in Sarawak.

At that date the laws in force in England are —

(1) Fatal Accidents Act, 1846 — See *Halsbury's* Statutes of England, Volume 17, page 4.

(2) Fatal Accidents (Damages) Act, 1908 — See *Halsbury's* Statutes of England, Volume 17, page 10.

(3) Law Reform (Miscellaneous Provisions) Act, 1934 — See *Halsbury's* Statutes of England, Volume 17, page 11.

(4) Law Reform (Contributory Negligence) Act, 1945 — See Schedule to Sarawak Application of Laws Ordinance (Cap. 2).

(5) Law Reform (Personal Injuries) Act, 1948 — See *Halsbury's* Statutes of England, Volume 25, page 364.

We are here not concerned with the Fatal Accidents (Damages) Act, 1908, as there are in the instant case no insurance monies to be excluded in assessing damages. Nor are we concerned with the Law Reform (Contributory Negligence) Act, 1945, which speaks of contribution as liability has been admitted by the respondent.

The question which arises for decision is whether account should be taken of the pension *i.e.* $110.27 per month which was received by the widow.

It is convenient to refer to the evidence of Hii Chee Huat (DW1), senior treasury accountant, Treasury, Kuching. His evidence was to the effect that as a result of the death of Chin Hon San, pension in the sum of $1,323.22 *per annum* (*i.e.* $110.27 *per mensem*) was paid to the widow.

In addition, death gratuity of $2,760 was paid pursuant to section 16 of the Pensions Ordinance of Sarawak (Cap. 89) (Exhibit D9).

There was no cross-examination of this witness by counsel for the plaintiff, nor was he re-examined.

Section 40 of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936 (page 866 of the (1936) Statutes) reads as follows:

"Exclusion of widows' and orphans' pensions in assessment of damages.

40. In assessing damages in any action under the Fatal Accidents Acts, 1846 to 1908, whether commenced before or after the commencement of this Act, there shall not be taken into account any widows' pension, additional allowance or orphans' pension payable under this Act."

That section has no counterpart in our Widows' and Orphans' Pensions Ordinance (Sarawak, Cap. 90).

In other words, we are back to the common law doctrine whereby such pensions must be taken into account in assessing damages.

Page 943 of *Halsbury's* Statutes of England, Second Edition, Volume 39, under the heading "General Note" says:

"The rule at common law respecting assessment of claims for damages under the Fatal Accidents Acts and the Carriage by Air Act, 1932 (c. 36), Vol. 2, p. 66, was that account should be taken of any benefit accruing to the claimant by reason of the death of the deceased; see, for example, *Baker* v. *Dalgleish S.S. Co. Ltd.*, [1922] 1 K.B. 361; *Lory* v. *Great Western Railway Co.*, [1942] 1 All E.R. 230 ...."

The old law stated in "General rule" is what the court is now concerned with. In other words, widows' and orphans' pensions and death gratuity must be taken into account.

I will now refer to sections 16 and 17 of the Pensions Ordinance (Cap. 89) as amended by the Pensions (Amendment) Ordinance, 1963 (No. 7 of 1963).

Section 16(1), so far as relevant, provides —

"(1) Where an officer holding a pensionable office who is not on probation or agreement, or an officer holding a non-pensionable office to which he has been confirmed, dies while in public service under the Government of Sarawak the local pensions authority may grant to his legal representative a gratuity of an amount not exceeding his annual pensionable emoluments or his commuted pension gratuity, if any, whichever is the greater:

Provided that, for the purposes of this section, an officer holding a pensionable office on probation who dies in the circumstances mentioned in sub-section (1) of section 17 shall be deemed to have been confirmed in his office."

Section 17, so far as is material, provides as follows:

"17 (1) Where an officer dies as a result of injuries received —

(a) in the actual discharge of his duty;

(b) without his own default; and

(c) on account of circumstances specifically attributable to the nature of his duty,

while in the service of the Government of Sarawak, it shall be lawful for the local pensions authority to grant, in addition to the grant, if any, made to his legal personal representative under section 16..."

In *Lory* v. *Great Western Railway Co.*,[1] the widow received a gratuitous payment of £160 from the Police Charitable Fund and a pension for herself.

The plaintiff contended that these pensions ought not to be taken into account in assessing damages, as in the case of the statutory fund they were subject to the fulfilment of the prescribed conditions, while those received from the voluntary fund were in the nature of ordinary charitable payments.

It was held that the pensions received from both funds, which included the gratuity of £160, were not in the nature of insurance moneys and had to be taken into account in the assessment of damages.

To my mind, the legal position appears to be that gratuity and pension under the provisions of the Widows' and Orphans' Pensions Ordinance must be taken into account.

I have not overlooked the decision in *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee, Malaysia*[2] where it was held that the pension awarded to the plaintiff by the government should not be taken into account in assessing the damages at common law.

The law in West Malaysia is different from Sarawak. Section 7 of the Civil Law Ordinance, 1956 as amended by Act No. 30 of 1966 re-enacts the law in the United Kingdom, and provides compensation to the family of a person for loss occasioned by his death.

Sub-section (3) of section 7 is followed by a proviso in these terms:

"(3) ....

Provided that —

(i) in assessing such damages there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the coming into force of this Ordinance;

(ii) damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought.

Provided further that in assessing such damages there shall also not be taken into account —

(i) any sums payable as a result of the death under section 13 of the Employees Provident Fund Ordinance, 1951;

(ii) any pension or gratuity, which has been or will or may be paid as a result of the death."

There is no evidence of pain and suffering. The only evidence before this court is loss of expectation of life.

Now it was held by the Court of Appeal in *Lee Sai Cheong* v. *Wan Lim Cheong*,[3] and again by the Federal Court in *Chang Kok Sing & Anor.* v. *Koo Lan*[4] that the conventional figure under this head is $3,000 in the case of a young adult.

This court is bound by this decision and since there is no evidence in the fall in the value of currency, I would assess the figure under this head at $3,000.

The Law Reform (Miscellaneous Provisions) Act, 1934 related to funeral expenses.

The widow has admitted that the major part of the expenses related to mourning. It was held in *Johnson* v. *Baker*[5] that money spent on mourning supplied to the widow was not a funeral expense.

McCardie J. in *Goldstein* v. *Salvation Army Assurance Society*[6] stated that the funeral expenses must be reasonable and proper and said at page 297:

"He (the judge) must remember the station in life, the occupation, and the creed of the dead person, and the general circumstances of the case, and he ought not to allow as a funeral expense anything beyond these reasonable and proper limits."

Since no receipts were produced the defence suggested a sum of $500. In my opinion, a fair sum to be awarded is $1,000 under this item.

The speech of Lord Diplock in *Mallett* v. *McMonagle*[7] contains a full analysis of the uncertainties which arise at various stages in this estimate and the practical ways of dealing with them.

The practical approach to the calculation of the damages has been stated by Lord Wright in *Davies and Another* v. *Powell Duffryn Associated Collieries Ltd.*[8] at page 617 in the following passage from his judgment:

"It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased

was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."

One further matter is relevant to the issue. When it comes to determining the multiple, guidance can be obtained from the speech of Lord Diplock in *Mallett* v. *McMonagle*, a House of Lords decision.

Now, basing upon the method as set out in *Mallett* v. *McMonagle* the calculations would, in my opinion, be as follows:

Salary	$230.00 p.m.
Add to that child allowance	$ 17.00 p.m.
Total	$247.00 p.m.
Deducting Employees' Provident Fund	$ 11.50 p.m.
Balance	$235.50 p.m.
Overtime works out at	$100.00 p.m.
	$335.50 p.m.
Evidence shows the husband used $20 to $30. Taking the mean and deducting	$ 25.00 p.m.
Balance	$310.50 p.m.
For purposes of calculation two children equal one adult making in all 3 adults. Husband gets 1/3 of the figure by apportionments. Deducting 1/3 of $310.50 gives a sum of	$103.50 p.m.
Net dependency is	$207.00 p.m.
The pension granted to the widow has to be deducted	$110.27 p.m.
	$ 96.73 p.m.
Deceased is on an incremental time scale rising to $350.00 in 8 years. In other words, an increase of $120 *per mensem* is expected in 8 years.	
Take half-way figure this works out as $60.00 (In fact the sum is more in first half of 8 years and less in second half of 8 years)	$ 60.00 p.m.
That gives a figure of	$156.73 p.m.

$156.73 is therefore the dependency figure and multiplied by 12 = $1,880.76 *per annum.*

The widow has in fact lost this sum of money payable for 15 years. Deceased was 29¾ years old.

In other words, the widow had lost an annuity of $1,880.76 payable for 25 years.

According to Diplock L.J.'s judgment in *Mallett* v. *McMonagle* the correct percentage to be applied is 5%.

And, according to *Archer's* Loan Repayment and Compound Interest Tables, 5% for 25 years = 14.09394457.

For convenience, the figure of 14.1 is adopted. The multiplier is therefore 14.1.

Multiply $1,880.76 by 14.1 we get $26,518.72.

From this sum deduct amount of gratuity $2,760.00 = $23,758.72.

As a result of the death of her husband the widow received $6,676.46 from the Chartered Bank, Miri, as shown in Exhibit P1.

What she had received is in fact accelerated payment, *i.e.* $6,676.46 for 25 years.

This sum has to be deducted (see *Seenivasan & Anor.* v. *Lim Yew Seng*[9] at page 23).

In my opinion, a fair figure to be deducted is $2,000 from $23,758.72 = $21,758.72.

To that sum must be added a reasonable sum for funeral expenses, which I assess at $1,000 which makes a sum of $21,758.72 + $1,000 = $22,758.72.

Accordingly, that is the final figure allowable for Fatal Accidents Acts damages and $3,000 for loss of expectation of life.

The total Fatal Accidents Acts damages should be $21,758.72 less $3,000 for loss of expectation of life.

Therefore, the total amount for Fatal Accidents Acts damages is $18,758.72.

The grand total of $22,758.72 is made up of —

$18,758.72	...	Fatal Accidents Acts damages
$ 3,000.00	...	Loss of expectation of life
$ 1,000.00	...	Funeral expenses

I desire to draw attention that the grand total of $22,758.72 arrived at are not bargaining figures. I think they are a fair and proper sum of compensation in the circumstances.

As to the question of the multiplier some guidance is found in the case of *Lim Ah Chi* v. *Tah Ah Mui & Anor.*[10]

Where as here the age of the deceased is more or less the same, the Court of Appeal in that case gave only 20 years.

Counsel for the defendant submitted, and I agree with him, that 25 years' purchase seems the appropriate multiplier.

Counsel for the plaintiff cited a number of English authorities on the question of the pension which was held not deductible in assessing damages, but such being the state of our law in Sarawak the court cannot find anything in the cases which can be of assistance to him.

Here, it is of importance to observe the legal position in respect of pensions in England.

This is set out under the heading "(iii) Pensions" in *Munkman's* Damages for Personal Injuries and Death, 4th Edition, at page 153:

"Pensions did not come within the Act of 1908 and had to be brought into account against the damages...."

and further down on the same page:

"All pensions are excluded by the Act of 1959 where death occurs after 29th July 1959."

I accordingly give judgment in favour of the plaintiff as follows:

(1) Special damages — $1,000.00 for funeral expenses. This amount is to be paid direct to the widow.

(2) General damages — $21,758.72 to be apportioned on the following basis:

Widow	...	$14,505.82
1st child)		
)	...	$ 7,252.90
2nd child)		

The award in respect of the children is to be deposited in an approved savings bank on trust for the minors.

Order accordingly.

RE SING SING ELECTRICAL WORKS & ORS.' APPLICATIONS

[O.C.J. (B.T.H. Lee J.) July 9, 1971]

[Kuching — Applications for Execution Nos. K. 74 of 1970, K. 76 of 1970, K. 71 of 1970 and K. 62 of 1970]

Practice and Procedure — Execution proceedings — Rateable distribution — Application for — Conditions to be fulfilled — R.S.C. 1957, O. 46, r. 7, O. 46A r. 1.

Practice and Procedure — Applications and proceedings in chambers — Service of summonses, not being originating summons, requiring appearance — R.S.C. 1957, O. 54 r. 4E.

These were applications by three judgment-creditors who claimed for rateable distribution among the applicants and respondent in respect of proceeds realized from the sale of immoveable properties belonging to the judgment-debtor.

These cases had been consolidated and argued as one case falling under the same consideration.

The facts appear sufficiently from the judgment.

Held: (1) the primary condition to be fulfilled by a person claiming to participate in the assets of the judgment-debtor is that he must have had a decree for the payment of money, which has been obtained by him against the same judgment-debtor;

(2) in this case since the applicants had satisfied the above conditions, the order was granted that the assets of the judgment-debtor be rateably distributed among the decree-holders.

Per B.T.H. Lee J.: "As it now stands, the provisions of Order 46A are to my mind simply designed to facilitate the expedient administration of assets of the judgment-debtor.... The object of the order is fairly clear, namely, to prevent multiplicity of execution proceedings, and at the same time to ensure that there was equitable distribution of the assets of the judgment-debtor, among the various decree-holders who have the right to have their decrees satisfied".

Cases referred to:-

(1) *Hoti Lal* v. *Chatura Prasad & Ors.* A.I.R. 1941 All. 110.

(2) *Nathmal* v. *Zindamal Sultanmal* A.I.R. 1951 Ajmer 58.

(3) *Suikeena Katum Sahiba* v. *Mohamed Abdul Aziz* A.I.R. 1916 Mad. 792.

(4) *Imtiaz Ahmad* v. *Ghulam Ali* P.L.D. 1963 S.C. 382. at p. 400.

SUMMONS IN CHAMBERS.

Chong Siew Fai for the applicants.

S. Sahathevan for the respondent.

Cur. Adv. Vult.

B.T.H. Lee J.: These are applications by three judgment-creditors (hereinafter called "the applicants") claiming for rateable distribution among the applicants and respondent in respect of proceeds realised from the sale of Ng Ah Khin's immoveable properties. the judgment-debtor in this case.

These cases have been consolidated and have been argued as one case falling under the same consideration.

Briefly, the facts are as follows:—

On October 10th, 1970, the judgment-debtor's lands were sold by public auction for a sum of $8,211.00.

On October 19th, 1970, the applicants wrote to the sheriff claiming rateable distribution of the assets in the hands of the court.

On November 9th, 1970, Eng Khiong Furniture & Woodworking Factory (judgment-creditor No. 4) (hereinafter called "the respondent") applied for payment out of the assets and the application came on for hearing in chambers on December 4th, 1970.

On November 16th, 1970, the sheriff directed the applicants to take steps to appear before the judge in chambers on that date fixed for hearing and claim for rateable distribution.

Affidavits were filed by the applicants on December 3rd, 1970 and copies thereof were delivered to counsel for the respondent on the same day.

Formal applications for rateable distribution by way of summons in chambers were duly filed and copies thereof served on counsel for the respondent.

An objection was taken by counsel for the respondent that the formal applications by way of summons in chambers were bad for non-compliance with the provisions of Order 54 rule 4E.

The affidavits filed on December 3rd were not delivered to counsel for the respondent as required by the rule which requires two clear days.

The affidavits were delivered on December 3rd, *i.e.* one day before the hearing of the application in chambers of the counsel for the respondent for payment out.

It was on this issue that the court adjourned the matter into open court for argument.

It is convenient at the outset to set out the relevant portion of Order 46A which is in the following terms:

"Proceeds of execution sale to be distributed rateably among judgment-creditors.

1. (1) Where assets are realised by sale or otherwise in execution of an order or judgment and more persons than one have, prior to the realisation, attached the property from which such assets have been realised in execution of orders or judgments for the payment of money against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of the realisation, shall be distributed rateably among all such persons ...."